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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 USA TIRE MARKETING INC., a  
11 Canadian corporation,

12 Plaintiff,

13 v.

14 TORQUE TRANSPORT, a Canadian  
15 corporation; COMPREHENSIVE  
16 TRAFFIC SYSTEMS INC., a Colorado  
17 corporation; DAVID C WILSON and  
18 THERESA M WILSON, individually and  
19 the marital community composed thereof,  
d/b/a Wilson Brothers Heavy Hauling;  
THE TIRE GUYS INC., d/b/a Tire-Rama,  
a Montana corporation; RIO TINTO  
ENERGY AMERICA INC., d/b/a Jacobs  
Ranch Mine, a Delaware corporation,

20 Defendants.

CASE NO. C07-5470BHS

ORDER GRANTING  
DEFENDANT TIRE GUY'S  
MOTION TO COMPEL  
PRODUCTION OF  
PLAINTIFF'S PRIVATE  
INVESTIGATOR'S REPORT

21 This matter comes before the Court on Defendant Tire Guy's Motion to Compel  
22 Production of Plaintiff's Private Investigator's Report (Dkt. 56). The Court has  
23 considered the pleadings filed in support of and in opposition to the motion and the  
24 remainder of the file and hereby grants the motion for the reasons stated herein.

25 **I. FACTUAL AND PROCEDURAL BACKGROUND**

26 According to the complaint, the facts underlying this matter are as follows: In  
27 January of 2006, USA Tire Marketing, Inc. ("USA Tire") engaged Torque Transport to  
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1 deliver 12 tires to an address in Vancouver, Washington in conjunction with a sale of the  
2 tires to Evergreen Parts & Equipment (“the Buyer”). Torque Transport engaged  
3 Comprehensive Traffic Systems, Inc. (“CTS”) to effect the transport and delivery of the  
4 tires. On or about February 1, 2006, the Tires were delivered to the Buyer in Vancouver,  
5 Washington. The Buyer rejected the tires.

6 Torque Transport, CTS, or both, directed that the tires then be delivered to a lot  
7 located in Lacey, Washington and rented by Defendants David C. Wilson and Theresa M.  
8 Wilson. The tires were to be stored until arrangements could be made for delivery to a  
9 different purchaser. The tires were delivered to the Lacey location in two shipments on  
10 February 1 and February 5 of 2006.

11 On March 22, 2006, USA Tire engaged Torque Transport to deliver six of the tires  
12 to a buyer in Wyoming. On April 13, 2006, USA Tire engaged Torque Transport to  
13 deliver the other six tires to a buyer in Delaware.

14 On March 22, 2006, the Wilsons agreed to sell the tires to Defendant Rio Tinto  
15 Energy America, Inc. (“Rio Tinto”). Defendant The Tire Guys, Inc. (“Tire-Rama”)  
16 arranged and brokered the sale. The tires were delivered to Rio Tinto in Wyoming on  
17 April 1, 2006.

18 On June 5, 2008, the Court entered default judgment against Defendants David C.  
19 Wilson and Theresa M. Wilson in the sum of \$540,000.00, plus costs and interest. Dkt.  
20 51.

21 Tire-Rama now moves to compel disclosure of USA Tire’s private investigator  
22 report. Dkt. 56. USA Tire contends that the report is covered by the work product  
23 doctrine. Tire-Rama contends that there are issues of fact as to whether the tires sold to  
24 Rio Tinto are the tires owned by USA Tire and that USA Tire’s investigative report is the  
25 only source of this information obtainable without undue hardship.

## II. STANDARDS

Federal Rule of Civil Procedure 26 governs discovery and provides, in part, as follows:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

Fed. R. Civ. P. 26(b)(1). Discovery must be limited if the Court determines that the discovery sought is unreasonably cumulative or duplicative or is obtainable from a more convenient, less burdensome, or less expensive source; that the seeking party has had ample opportunity to obtain the information sought; or that the burden or expense of the discovery request outweighs its likely benefit. Fed. R. Civ. P. 26(b)(2)(C).

If a party fails to answer an interrogatory or a request for production, the party may move to compel disclosure pursuant to Federal Rule of Civil Procedure 37. Fed. R. Civ. P. 37(a)(3)(B). The motion must certify that the parties have made a good faith effort to confer and resolve the dispute themselves. Fed. R. Civ. P. 37(a)(1). A good faith effort to confer "requires a face-to-face meeting or a telephone conference." Local Rule CR 37(a)(2)(A).

In this case, counsel for USA Tire and Tire-Rama conferred on July 9, 2007, but were unable to resolve this discovery dispute without seeking intervention by the Court. Dkt. 57 at 2. Tire-Rama now moves for an order compelling USA Tire to produce a copy of its investigator's report as identified in its response to Defendant Torque Transport's Interrogatory 16. Dkt. 56-2.

### III. DISCUSSION

Trial preparation materials ordinarily are not discoverable unless the requesting party has a substantial need for the work product materials and cannot obtain the substantial equivalent absent undue hardship:

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and  
(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The work product doctrine extends to documents created by investigators working for attorneys if the documents were created in anticipation of litigation. *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)*, 357 F.3d 900, 907 (9th Cir. 2004). To qualify for protection under the work product doctrine, documents must be prepared (1) in anticipation of litigation or for trial (2) by or for another party or by or for the other party's representative. *In re California Public Utilities Com'n*, 892 F.2d 778, 780-81 (9th Cir. 1989).

If the document is prepared in anticipation of litigation and to serve another purpose, the document will be deemed prepared "in anticipation of litigation" and eligible for work product protection if the document was prepared or obtained *because of* the prospect of litigation. *In re Grand Jury Subpoena*, 357 F.3d at 907. Under this "because of" standard, courts do not weigh the primary or secondary motives behind the creation of the document and instead consider the totality of the circumstances and whether the document would not have been created in a substantially similar form but for the prospect of litigation. *Id.* at 908. The work product doctrine will apply if the "litigation purpose so

1 permeates any non-litigation purpose that the two purposes cannot be discretely separated  
2 from the factual nexus as a whole.” *Id.* at 910. Put another way, “[i]f the document would  
3 not have been generated ‘but for’ litigation, it is privileged. However, if it was generated  
4 for purposes other than litigation, even though litigation may have been a ‘real  
5 possibility’, it must be disclosed.” *Id.* The Court therefore first inquires whether USA  
6 Tire’s investigative report is covered by the work product doctrine and then whether  
7 disclosure is proper.

#### 8 **A. WORK PRODUCT DOCTRINE**

9 Tire-Rama contends that the report does not fall within the work product doctrine  
10 because it was prepared due to USA Tire’s “need to find its tires” and that this purpose  
11 constitutes “separate and distinct business purpose.” Dkt. 56 at 6. To determine the  
12 purpose behind the investigator’s report, the Court reviews the facts surrounding the  
13 creation of the report.

14 USA Tire retained the law firm of Inslee Best & Ryder, P.S. (“Inslee Best”) on  
15 April 21, 2006, to file a civil lawsuit to recover damages due to perceived  
16 misappropriation of USA Tire’s tires. Dkt. 63 at 2. In December of 2006, Inslee Best  
17 hired Woodruff & Associates, PLLC Investigations (“Woodruff & Associates”) “to assist  
18 in preparing plaintiff’s legal claims, determine the proper defendants, and determine the  
19 final disposition of the Tires.” *Id.* at 2. At the direction of USA Tire’s counsel, Woodruff  
20 & Associates interviewed witnesses, performed research, and prepared investigative  
21 reports for Inslee Best. *Id.* Inslee Best filed the complaint in this matter on September 7,  
22 2007. Dkt. 1. Woodruff & Associates continues to assist Inslee Best in the prosecution of  
23 this litigation. Dkt. 63 at 2.

24 The Court concludes that investigative reports prepared by Woodruff & Associates  
25 at the direction of Inslee Best were prepared in anticipation of litigation and therefore are  
26 not discoverable unless Tire-Rama demonstrates a substantial need for the reports and  
27 that it cannot obtain the substantial equivalent without undue hardship. The reports were  
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1 prepared at the direction of USA-Tire's counsel, who was retained to pursue a civil  
2 lawsuit to recover damages for alleged misappropriation of USA Tire's property. To the  
3 extent that the reports also served the purpose of helping USA Tire locate and recover its  
4 property, this purpose cannot be discretely separated from the anticipated litigation.

5 **B. SUBSTANTIAL NEED AND UNDUE HARDSHIP**

6 USA Tire identifies several other sources for information that Tire-Rama hopes is  
7 contained in Woodruff & Associates' reports. According to Tire-Rama, Joe Nagel of CTS  
8 believes that the tires belonging to USA Tire could be located at one of three Denny's  
9 Restaurant locations. *See* Dkt. 57, Exh. B at 10; Dkt. 57, Exh. D at 18. Tire-Rama  
10 contends that Mr. Nagel is currently in Jordan and cannot be contacted. *See* Dkt. 57 at 2-3  
11 (detailing efforts to contact Mr. Nagel). According to USA Tire, CTS has agreed to  
12 contact Mr. Nagel to determine his availability for a deposition. Dkt. 63 at 3. As of July  
13 28, 2008, CTS has been unable to contact Mr. Nagel. Dkt. 67 at 2.

14 Tire-Rama contends that the only other source of this information is the Wilsons,  
15 who have defaulted in this matter. *See* Dkt. 56 at 3 ("The Wilsons could sort this out but  
16 we doubt they will respond to a subpoena given that they have failed to respond to this  
17 lawsuit."). Tire-Rama has admittedly made no attempt to subpoena the Wilsons.

18 According to USA Tire, John Griffiths of First State Logistics is the truck driver  
19 who transported the tires to the Wilsons' lot and may have information sought by Tire-  
20 Rama. Tire-Rama has been unable to locate Mr. Griffiths or First State Logistics despite  
21 pursuing contact information provided by CTS in response to discovery requests and  
22 conducting its own research. Dkt. 66 at 4 Dkt. 67 at 3.

23 USA Tire has also identified seven current or former employees of the Wilsons  
24 who were allegedly present at the time the tires were delivered to the Wilsons. Tire-Rama  
25 has attempted to contact these witnesses; Tire-Rama has been unable to contact five of the  
26 witnesses, and the two witnesses who were contacted deny having any knowledge  
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1 relating to the origin of the tires and deny being present when the tires were delivered.  
2 Dkt. 66 at 4; Dkt. 67 at 4-5.

3 Finally, USA Tire contends that Tire-Rama may obtain substantially equivalent  
4 information from Grace Wilson, who accepted payment on behalf of the Wilsons. Tire-  
5 Rama contacted Grace Wilson, and she denies having any knowledge of the Wilsons'  
6 business or of the tires located on the Wilsons' property Dkt. 66 at 4.


7 Tire-Rama has demonstrated a substantial need for information regarding the  
8 identity and location of the tires stored on the Wilsons' lot and sold to Rio Tinto. Tire-  
9 Rama has endeavored to contact individuals who may provide information substantially  
10 equivalent to that contained in Woodruff & Associates' reports but has been unable to do  
11 so. Accordingly, USA Tire shall produce a copy of Woodruff & Associates' reports,  
12 redacting the mental impressions, conclusions, opinions, or legal theories of USA Tire's  
13 attorneys or other representatives concerning this litigation.

#### 14 IV. ORDER

15 Therefore, it is hereby

16 **ORDERED** that Defendant Tire Guy's Motion to Compel Production of  
17 Plaintiff's Private Investigator's Report (Dkt. 56) is **GRANTED**.

18 DATED this 11<sup>th</sup> day of August, 2008.

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22 BENJAMIN H. SETTLE  
23 United States District Judge  
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